Supreme Court, U. S.
FILED
OCT 31 1980
JR., CLERK

No. 80-390

In the Supreme Court of the United States

OCTOBER TERM, 1980

SUSAN T. SMITH, PETITIONER

v.

E.H. DAWS, POSTMASTER, UNITED STATES POSTAL SERVICE, MIAMI, FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Haynes v. *U.S. Pipe & Foundry Co.*, 362 F. 2d 414 3

Hines v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 3

Statutes:

Labor-Management Relations Act, 29 U.S.C. 141 *et seq.*:

Section 203, 29 U.S.C. 173 3

Section 301, 29 U.S.C. 185 ..... 2, 3

Postal Reorganization Act, 39 U.S.C. 101 *et seq.*:

39 U.S.C. 1005(a)(1) 5

39 U.S.C. 1005(a)(1)(A) 3, 4

39 U.S.C. 1005(a)(2) 5

39 U.S.C. 1208 4

39 U.S.C. 1208(b) 2

39 U.S.C. 1209(a) 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-390

SUSAN T. SMITH, PETITIONER

v.

E.H. DAWS, POSTMASTER, UNITED STATES POSTAL SERVICE, MIAMI, FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

After petitioner was discharged by the United States Postal Service for excessive absences, she invoked the arbitration provisions of the collective bargaining contract between the Service and her union. An impartial arbitrator found that her termination was "for just cause" (App. A-38).[1] Petitioner contends that the courts below erred in refusing to review the arbitrator's ruling.

1. On September 17, 1976, the Postal Service sent petitioner a notice of removal for unsatisfactory attendance. This notice informed petitioner of her right, under the 1975 National Agreement between the

---

[1] "App." refers to the Appendix of documents bound with the brief filed by the government in the court of appeals.

American Postal Workers Union, AFL-CIO and the Postal Service, to submit a grievance for arbitration (App. A-32 to A-33). After an evidentiary hearing, in which petitioner was represented by the local union president, the arbitrator found that petitioner's termination was "for just cause" (App. A-38) and that "the absentee record was a proper cause for removal" (*id.* at A-36). Although petitioner's absences were caused by illness and had been administratively approved, it was clear that her attendance record was unacceptable (App. A-35 to A-36):

> The Arbitrator finds that the grievant was an abnormally sensitive person who simply was unable to get along with her fellow employees. The record shows and I find that she was an excellent worker. She was, however, despite her length of service, unable to adjust to her work environment.
>
> * * * * *
>
> * * * [A]n employer has the right to expect acceptable levels of attendance from their [*sic*] employees and * * * when such attendance is not had, discharge is appropriate despite the fact that the absences may be for valid and legitimate medical reasons.

Petitioner then commenced this action in the United States District Court for the Southern District of Florida under 39 U.S.C. 1208(b), which authorizes the district courts to entertain "[s]uits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees * * *." The district court noted (Pet. App. 20) that Section 1208(b) "effectively mirrors" Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185, and that "cases under § 301 are controlling in [Section

1208(b)] suits. See *Nat'l Assoc. of Letter Carriers* v. *Sombretto*, 449 F. 2d 915 (2nd Cir. 1971) [;] *Am. Postal Workers Union* v. *U.S. Postal Service*, 356 F. Supp. 335 (E.D. Tex [.] 1972)." Relying on cases construing Section 301,[2] the district court found that the arbitrator's award was "final and binding" (Pet. App. 21) and therefore entered summary judgment for the government.

On appeal, petitioner abandoned the claim that the Postal Service had violated the collective bargaining agreement. Instead, she contended, as she does here, that as a "preference eligible" employee, she was entitled to judicial review of the arbitration award. Alternatively, she urged that the arbitrator's decision should be reversed in light of a subsequent change in postal employment policy.

The court of appeals affirmed. The court pointed out (Pet. App. 8-13) that the principles stated in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and *Haynes* v. *U.S. Pipe & Foundry Co.*, 362 F. 2d 414 (5th Cir. 1966), are not necessarily applicable in a case such as this, because Section 203 of the LMRA, 29 U.S.C. 173, is not among those provisions applicable to postal workers under the Postal Reorganization Act (see 39 U.S.C. 1209(a)), and Section 203 formed the basis for the "*Hines-Haynes* rationale" (Pet. App. 11). Nonetheless, the court of appeals held that 39 U.S.C. 1005(a)(1)(A), which provides for administrative review of adverse personnel actions "except to the extent of any inconsistency with * * * the provisions of any collective-bargaining agreement * * *," requires the same result that would be reached if the "*Hines-Haynes* rationale" were directly applicable (Pet. App. 12). The court observed that the provisions of the governing collective-bargaining

---

[2]See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Haynes* v. *U.S. Pipe & Foundry Co.*, 362 F. 2d 414 (5th Cir. 1966).

agreement provide for "binding and final" arbitration, that petitioner did not contend that she was inadequately represented by her union during arbitration, that the arbitrator found no contract violation, and that the merits of that decision are not subject to judicial review (*id.* at 12-13). Thus, petitioner failed to show any ground for relief under 39 U.S.C. 1208 (Pet. App. 13).

2. Petitioner asserts that, as a "preference eligible" employee, she is entitled to judicial review of the arbitrator's decision. But, as the court of appeals explained (Pet. App. 16-17; emphasis in original & footnotes omitted):

> * * * The prohibition of [39 U.S.C.] section 1005(a)(2), if it is such, expressly applies only to "a preference eligible (*as that term is defined under* [5 U.S.C.] *section 2108(3)* * * *)," a definition restricted to preference rights given veterans and some members of their families. Neither the pleadings, the evidence, nor any contention in brief indicate that the plaintiff-appellant is within the category of "preference eligible" employees as thus statutorily excepted from relegation to collective-bargaining rather than civil-service disciplinary review rights. Her argument that she is within this statutory exception therefore fails.

The court of appeals expressly rejected (Pet. App. 17 n. 10) petitioner's theory that "preference eligible" status obtains with respect to *every* federal employee who has "completed a probationary or trial period"—an approach that would render the provisions of Section 1005(a)(1)(A) meaningless. Petitioner does not contest this holding; she ignores it.

Moreover, even if petitioner is a "preference eligible" employee, she is not entitled to judicial review of the arbitration award. Had petitioner elected to pursue the administrative remedies available to "preference

eligible" employees (see 39 U.S.C. 1005(a)(1) and (2)), she might have been entitled to judicial review of an adverse administrative decision. But petitioner chose instead to pursue her remedies under the collective-bargaining agreement, including binding arbitration. There is no support for her claim that she is entitled to review of the arbitrator's decision following exhaustion of this separate set of remedies.

3. Petitioner urges that, should this case be adjudicated on its merits, the arbitrator's award should be reviewed in light of a change in Postal Service policy that occurred after the arbitrator's decision. Under the new policy, the Service will not take disciplinary action against an employee based upon administratively-approved sick leave, even if excessive. As the court below properly observed (Pet. App. 17-18), however, this policy change does not suggest that there was a breach of the collective-bargaining contract in petitioner's case, which is a prerequisite to any claim under 39 U.S.C. 1208(b).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1980

DOJ-1980-10